

**Before the
Federal Communications Commission
Washington, D.C. 20554**

| | | |
|--|---|----------------------|
| In the Matter of: |) | |
| |) | |
| Creation of a Low Power Radio Service |) | MM Docket No. 99-25 |
| |) | |
| Amendment of Service and Eligibility |) | MB Docket No. 07-172 |
| Rules for FM Broadcast Translator Stations |) | |

REPLY COMMENTS OF PROMETHEUS RADIO PROJECT

Introduction

In our initial comments filed jointly with Future of Music Coalition and United Church of Christ, Prometheus commended the Commission for its efforts to chart a path for the licensing of new LPFM stations in accordance with the Local Community Radio Act (“LCRA”). We shared our views on the meaning of Section 5 of the LCRA, raised concerns about the timeline for an LPFM application window, and suggested several ways to address translator trafficking. Prometheus also jointly submitted a technical proposal with REC Networks and Common Frequency to refine the Commission’s methodology to ensure LPFM availability in areas of significant population. In these comments, we further develop several of these arguments. We note the widespread public support for the expansion of LPFM to urban areas. We explain that Arbitron markets are not an appropriate unit of analysis for the assessment of LPFM availability in the implementation of the LCRA. We respond in detail to proposals on the record with respect to the meaning of Section 5 of the LCRA. Finally, we urge the Commission to use the utmost caution in preserving LPFM opportunities, reiterating the need for a freeze on translator application modifications and prohibitions on translator speculation and AM rebroadcast.

I. There is Widespread Public Support for Expanding LPFM to Urban Areas.

We first wish to highlight on the widespread public support for the expansion of LPFM demonstrated in the proceeding thus far. Twenty-eight members of the House of Representatives wrote in support of the expansion of LPFM, which followed an earlier letter from the four lead cosponsors of the Local Community Radio Act (“LCRA”) in the House and Senate.¹ Civil rights organizations, including The Leadership Conference on Civil and Human Rights, National Hispanic Media Coalition, and the Minority Media Telecommunications Council each wrote letters in support of the Commission’s proposal to reserve channels for LPFM. A single comment filed by Prometheus on behalf of the Media and Democracy Coalition included 1,675 letters of support for LPFM. In addition, individuals and groups nationwide submitted more than 100 unique pro-LPFM comments. A coalition of 16 national organizations and 24 regional organizations also wrote in support of LPFM, including groups long active on the public interest in spectrum issues, such as Public Knowledge, Consumers Union, Free Press, the Center for Media Justice, and the New America Foundation’s Open Technology Initiative.² This coalition wrote in support of the Commission’s proposal in the *Third Further Notice* as well as the modifications proposed by Prometheus, Common Frequency, and REC Networks to better assess LPFM availability in urban areas. Tucson Community Radio wrote in support of the Prometheus proposal and its effect to reserve LPFM channels in Tucson, as did the Tennessee Citizen Action Network, writing to endorse the Prometheus proposal’s impact on LPFM availability in Nashville.

¹ Letter to Chairman Genachowski 28 Congresspersons, MB Docket 99-25, 07-172 (filed Sept. 7, 2011) (“Sept. 7 Letter from Congress”).

² See Comments of Prometheus et al.

We particularly wish to direct the Commission's attention to those commenters whose intent to serve their community with radio has been frustrated by the unnecessary restrictions on LPFM, many of whom have been active in this proceeding for years. More than 40 letters were filed by members and supporters of the Chicago Independent Radio Project (CHIRP), an organization that long has lobbied both Congress and the FCC in hopes of an LPFM-licensing opportunity. CHIRP currently operates an Internet-only station, which it views as a stepping stone to a broadcast license. Similarly the Somali American Community in Minneapolis temporarily has purchased two hours of airtime per week on a nearby AM station, but seeks to operate a broadcast station to better serve that city's growing Somali immigrant community. Riverwest Radio in Milwaukee wrote in support of their hope for an LPFM license, as did Hollow Earth Radio in Seattle, WA, Voice of Vashon on Vashon Island, WA, and Tube City Community Media in McKeesport, PA.

At least one commenter, Sisters of the Road in Portland, Oregon actively sought an LPFM license in 2000, but was barred from applying at the last minute due to the third-adjacent channel restrictions then-imposed by Congress. Sisters of the Road has waited over a decade for for a single LPFM license available in their city, even longer than translator applicants have waited, in most cases, for multiple licenses. Kern Community Radio, an LPFM hopeful prevented from applying in the 2007 NCE window due to spectrum crowding, seeks to serve Bakersfield, California, where they state that 94% percent of the programming on the noncommercial band is fed-in via satellite from over 100 miles away.

The volume of comments in support of LPFM, although impressive, represents only a small fraction of the wider public support for the expansion of community radio. Most of those

seeking to provide or receive LPFM service are not regular participants in Commission proceedings. Thus the groups and individuals who were able to learn about and navigate this rulemaking process correspond to much broader support for policies that expand community access to the airwaves.

II. The Commission’s Determinations About LPFM Availability and Disposition of Pending Translator Applications are Largely Correct.

A. The Commission Must Ensure Sufficient LPFM Stations in Areas of Significant Population.

As Prometheus explained in detail in its initial comments, the Commission’s methodology for assessing the adequacy of spectrum availability in various markets is sound, but must be focused more particularly on the areas of concern—the core urban areas with the most congested spectrum usage. Prometheus’ proposal is consistent with the LCRA’s focus on local communities in Section 5(2). Prometheus’ proposal is also appropriate because it takes into account geographic regions that are unpopulated. As the Commission found in its 2003 analysis of local radio, “radio stations serve people, not land.”³ The Commission’s proposal is sound, but requires some tightening to focus the analysis on the parts of the country that were devoid of low power radio stations prior to passage of the LCRA, areas of significant population.

B. Arbitron Markets are Not the Relevant Unit of Analysis in This Proceeding.

1. Grids Focus on the Spectrum Congested Portions of Arbitron Markets Which Were the Focus of the LCRA and Where LPFMs Will Be the Most Successful.

In contrast to Prometheus’ proposal which focuses on the core urban areas, NAB suggests that the Commission should broaden the geographic unit of analysis and instead use Arbitron

³ 2002 Biennial Regulatory Review, Report and Order and NPRM, 18 FCC Rcd 13620, 13724 (2003).

markets.⁴ NAB cites the Commission's use of Arbitron markets in the adoption of local media ownership rules as precedent for the relevance of those markets to this analysis.

NAB misunderstands the goals of the grids employed by the Commission and misapplies the Commission's prior reasoning with respect to Arbitron markets. As Prometheus explained in our initial comments, the goal of the Commission here is to implement the LCRA, which was primarily concerned with a lack of LPFM stations in the most spectrum-congested areas of the country. The LCRA's primary impact is to lift the third-adjacent channel limitation on LPFM stations which denied central cities access to a service that is most effective in the most population-dense areas.

LPFM stations require access to dense populations where translator stations do not. As the Commission has previously found, "LPFM stations, due to their limited service area potential, generally require higher population densities to be viable."⁵ It is impossible to credibly dispute that low-power radio stations serving 3- to 10-mile diameters are most likely to be effective and useful in the areas with the most concentrated population. By asking the FCC to move to use full Arbitron markets, the NAB proposes that the FCC should shift its focus from the central problem that the LCRA was designed to address.

As the NAB notes, LPFMs currently exist outside the Commission's grid in some Arbitron markets. But Arbitron markets are not uniform in their spectrum use. Some portions of these markets have more spectrum available, and thus it was possible to put LPFM stations in those portions of those markets even when the third-adjacent channel limitation was in place. These areas did not require the extraordinary measure of federal legislation to ensure LPFM

⁴ NAB Comments at 9-20.

⁵ Third Report and Order, 22 FCC Rcd at 21933 (2007).

service, and therefore are not the primary focus of Commission action in this proceeding. The one or two LPFM stations operating on the outskirts of a market demonstrate not the sufficiency of such locations for ensuring a robust LPFM service, but rather the absence of other opportunities. The 28 members of Congress commenting in this proceeding noted precisely this point, explaining that “[i]mplementation [of the LCRA] must ensure that channels are available in the most densely populated communities, those which have lacked access to new noncommercial radio for decades, as well as suburban and rural areas.”⁶

NAB argues that LPFM stations would not exist in locations outside the grid if their services were not reaching and serving listeners.⁷ Most such LPFM stations are best described as rural, and certainly, many rural LPFM stations provide excellent service to their communities. However, the expansion of rural LPFM is not primarily at issue in this proceeding. Furthermore, not all LPFM stations are serving listeners equally well. Some rebroadcast syndicated programming 24 hours a day, functioning essentially as translator stations, and therefore requiring fewer listeners and less community involvement to stay on air. It is our hope that the LPFM stations created through the passage of the Local Community Radio Act will not be acting simply as translators, but consistent with Congressional intent will be stations run by and for the communities who have been working towards this opportunity for over a decade.⁸ To achieve this aim, the Commission must license LPFM stations in locations of significant population

⁶ Letter to Chairman Genachowski 28 Congresspersons, MB Docket 99-25, 07-172 (filed Sept. 7, 2011) (“Sept. 7 Letter from Congress”).

⁷ Comments of NAB at 13.

⁸ See Sept. 7 Letter from Congress (“...we also urge the Commission to ensure that licenses are awarded to truly local churches, non-profit organizations, and schools...ready to use local programming to serve the public, connect their communities, and enrich local life.”).

2. Arbitron Markets are Relevant for Commercial Advertising, Not Spectrum Analysis.

NAB also misapplies the Commission's reasoning with respect to its adoption of Arbitron markets for purposes of the local radio ownership rule. As the Commission took great pains to point out when adopting the local radio ownership rules, its goals primarily concerned economic competition among commercial radio stations for listeners and advertisers. When strongly opposing adoption of Arbitron markets when the Commission revised its local radio ownership rule in 2003, the NAB itself described Arbitron markets as commercial currency:

Arbitron's service 'is the primary currency through which buyers and sellers of radio airtime negotiate prices for radio advertising in most local markets.' '[A]ll aspects of the information that Arbitron includes in these reports,' ... are 'driven by [the] single goal' of enabling 'commercial radio stations and advertisers [to] determine the relative value of radio station airtime.'⁹

Currency to negotiate prices for local advertising has no bearing on this proceeding. Presently, the Commission is not analyzing economic competition among commercial radio stations. Rather, the Commission is assessing the relative spectrum availability of two, distinct services in an attempt to remedy prior rules that prohibited one of these services from reaching its most relevant areas of service population. Thus Arbitron markets are not the appropriate unit of analysis for this inquiry.

Community-driven LPFM stations require not only a population of listeners, but a large enough population to volunteer at, underwrite for, and participate in the station. Their aim is not to return a profit, but to engage and serve their communities. As demonstrated in our comments,

⁹ 2002 Biennial Regulatory Review, Report and Order and NPRM, 18 FCC Rcd 13620, 13725 (2003) (quoting NAB Comments in MM Docket No. 00-244, Attachment B) (some omissions in the original), *aff'd in part and remanded in part sub nom. Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005).

population density increases in the center of the market, within the grid and particularly within the 21x21 grid recommended in our proposal, and in many markets, areas outside the grid (or even in the “outer zone” of the 31x31 grid outside the 21x21 grid) have relatively little population.¹⁰

C. The Commission Has Sufficient Record Evidence to Adopt a Market-Specific Processing Plan.

NAB suggests that the Commission’s proposal may lack record evidence, potentially violating the D.C. Circuit’s directive in *Bechtel*.¹¹ The Commission does not suffer from the lack of record evidence in this proceeding that it did before the DC Circuit in 1993. As Prometheus detailed in its opening comments, the Commission has significant, record evidence with respect to the differing purpose and relative importance of low-power radio vis-à-vis translators,¹² the inability of historically underserved groups to take advantage of the current LPFM service,¹³ and the likelihood that smaller and independently-owned radio outlets offer unique programming.¹⁴ Moreover, the Commission need not find that LPFMs are superior in all ways to translators to

¹⁰ Joint Comments of Prometheus Radio Project, REC Networks, and Common Frequency at 1-5 . See also the more complete report produced by REC Networks, Low Power FM Full Availability Study, REC Networks Comments Attachment 2 of 3, which includes census block group population for the 5.6km contour of every potential LPFM channel identified in the Top 150 markets.

¹¹ *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993). See NAB Comments at footnote 15.

¹² Prometheus Comments at 18-22 (outlining in detail the differences between translators and LPFM stations, including recent findings from the Commission’s *Information Needs of Communities Report*).

¹³ *Id.* at 10-11 (citing Wikle, Thomas A. and Comer, Jonathan C., “Barriers to Establishing Low-Power FM Radio in the United States,” *The Professional Geographer*, 61: 3, p. 376 (2009)).

¹⁴ *Id.* at 12-13 (citing Peter DiCola, *False Premises, False Promises*, (Future of Music Coalition, 2006) at 7 and S. Derek Turner, *Off the Dial: Female and Minority Ownership in Broadcast* (2007) at 7).

justify its proposed plan of action, but only that LPFM and translators are both useful tools to serve local radio markets and that the Commission has made an appropriate balance to ensure that local communities are served well with respect to both.¹⁵

In this regard, we believe that the Commission's analysis with respect to the relative numbers of existing translators and LPFM stations is particularly salient. The primary question at issue in this proceeding is the relative current and future licensing opportunities for each service, and the Commission has ample evidence to support its conclusions in this regard. LPFM and translators are not equally situated in the current landscape. Translators vastly outnumber LPFM, and have had significantly more time to apply for and receive licenses. Given this disparate history, it actually both would violate of the LCRA and be arbitrary and capricious for the Commission to ignore the relative imbalance between the existing landscape when making decisions with respect to each service's future spectrum needs.¹⁶

D. The Commission Must Exercise Caution to Preserve LPFM Availability in the Disposition of Pending Translator Applications.

Several parties argue that the Commission should retain any translator application that would not obstruct any LPFM licensing opportunity that is ultimately identified.¹⁷ Although such an arrangement may sound logical, in practice this proposal likely would result in the loss of significant LPFM licensing opportunities. As the four lead co-sponsors of the LCRA explained

¹⁵ Furthermore, for the purposes of legal review it is important to note that in *Bechtel* the DC Circuit evaluated integration under a policy statement, which is more vulnerable to attack than a rule adopted through notice-and-comment rulemaking. *Bechtel*, 10 F.3d at 878.

¹⁶ The comments of Common Frequency raise new concerns about the relative opportunities for each service, comparing coverage rather than the number of licenses. Common Frequency reports that three translators in Atlanta have the combined coverage of 40 LPFM stations, further underlining the imbalance between the two services. Comments of Common Frequency at 6-8.

¹⁷ Comments of NPR at 6, Comments of CSN para 8.

in the record of this proceeding, section 5(1) of the LCRA was “carefully negotiated” and “does not leave the Commission free to process translator applications to the exclusion of LPFM stations.” Thus, the Commission must proceed with extreme caution with respect to any proposals to process translators first.

The difficulty of predicting the preclusive impact of translator licensing on future LPFM opportunities has been amply demonstrated by the Commission’s past experience with the “ten cap.” A ten-application processing cap on translator stations seemed an effective means to preserve LPFM opportunities until Commission staff recently replicated the results of the Common Frequency study proving otherwise. This difficulty is exacerbated by the uncertainty as to the implementation of the LCRA’s technical provisions, which may allow greater flexibility to new LPFM stations. Although the Commission’s current methodology is much more data-driven than previous approaches, a software program is no replacement for a skilled broadcast allocations engineer working on behalf of an applicant to find viable local licensing opportunities. In some cities, the preservation of such currently unidentified opportunities could mean the difference between zero LPFM stations and two or more LPFM stations. Given the stakes for such communities, we urge the Commission to proceed with the utmost caution in taking steps that could eliminate LPFM opportunities.

Similarly, we believe the Commission’s decision to count LPFM channels, rather than identified locations, was appropriate. As discussed in our joint comments with REC Networks and Common Frequency, the Commission cannot determine whether each identified LPFM location is actually usable by potential LPFM applicants, and indeed states that they have made no effort to do so. Not only may such locations be mutually exclusive, in other cases these

locations are over water, in unpopulated regions, in locations not zoned for transmitter sites, or at sites otherwise unavailable for the purposes of LPFM broadcasting. The Commission has appropriately relied on channels, rather than locations, because a methodology relying on the assurance of LPFM floors will require the most conservative estimation techniques to achieve even a sizable fraction of the floors set.

Processing translator applications in spectrum-limited markets will almost certainly limit opportunities for LPFM stations. The reverse, as the Commission has acknowledged, is not true. We note, however, that the deferral of translator applications, until after an LPFM window, would have the intended effect of the proposal above, preserving all translator applications that do not interfere with LPFM licensing opportunities. This method would have the additional benefit of ensuring that the LPFM licensing opportunities protected are those corresponding to actual applications, removing any uncertainty as to demand. As of yet, no party to this proceeding has offered a solid argument for an interpretation of Section 5(3) of the LCRA that would prohibit this proposal.

Common Frequency concurs with Prometheus that the Commission should either freeze minor modifications of pending translator applications or defer processing of translators entirely until an LPFM filing window has taken place.¹⁸ We also support the view of REC Networks that such a freeze should apply, both for applicants and existing translators and permittees, to any translators that propose service within an Arbitron metro market county designated as a “dismiss” market or at a location within 40 km of the boundary of such an Arbitron metro market

¹⁸ Comments of Common Frequency at 13

county.¹⁹ For the aforementioned reasons, a freeze is necessary to ensure potential LPFM opportunities.

Finally, we wish to reiterate that the act of applying for a license does not confer any rights to spectrum. There is ample precedent for the dismissal of applications when the Commission has determined this is in the public interest.²⁰ The Commission is well within its rights to dismiss applications at any time, but such jurisdiction is especially clear in cases, such as the current situation, when a statute supersedes previous Commission policy. Indeed, LPFM applicants are well aware of such risk, having lost their applications after the passage of the Radio Broadcast Preservation Act placed restrictions on third adjacent frequencies.

In regard to the argument that the Commission should refresh the record to clean the database of defunct applications, proposed by both NPR and NAB, we do not think such a measure warrants the delay it would impose on a future LPFM window. If the Commission were to adopt this proposal, it would be important that the freeze on application modifications remain in place to ensure that such a delay does not result in the loss of LPFM opportunities.

Similarly, NPR suggests investigating large filers to determine whether they have the financial means and service plans to construct and operate proposed stations. Although we are sympathetic with the intent of this proposal, such a measure seems likely to unacceptably delay

¹⁹ “REC supports a freeze of minor changes such as channel changes, power increases, antenna system changes, tower height changes, directional antenna pattern changes and transmitter site locations on all existing translator licensees and permittees as well as amendments to original construction permit applications for translators that proposes service either within an Arbitron metro market county designated as a “dismiss” market or at a location within 40 km of the boundary³¹ of such an Arbitron metro market county.” REC Networks Comments at ¶17.

²⁰ e.g. *Neighborhood TV Company, Inc. v. FCC*, 742 F.2d 629 (D.C.Cir. 1984) (upholding FCC decision to freeze and limit processing of TV translator applications in the face of a pending rulemaking initiating the low power television service).

LPFM licensing. We further note that the Commission has other means for curbing speculation, which we address in Section IV below.

III. Section 5 of the LCRA Requires Minimum LPFM Access to Adequate Spectrum; Section 5(3) Specifically Addresses Secondary Status.

We respond in detail to the proposals on the record with respect to the meaning of Section 5 of the LCRA, and particularly Section 5(3). Several commenters do not make a particularized analysis of the specific meaning of the statute's provisions, and thus make wide-ranging and unsubstantiated claims about the impact of the statute on their own proposals and on the Commission's.

At the outset we note that no party has offered any meaningful analysis contradicting the Commission's overarching conclusion that Section 5(1) requires the Commission to "adopt licensing procedures that ensure some minimum number of licensing opportunities for each service" and "read together with Section 5(2), ... Section 5(1) to require[s] the Commission to provide, to the extent possible, licensing opportunities for both services in as many local communities as possible."²¹ The Commission's conclusion is further bolstered, as Prometheus made clear in its comments, by Section 5(2)'s emphasis to the needs of local communities, which reinforces Section 307(b)'s fundamental directive requiring license distribution "among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service...."²² Indeed, even the title of the section, "Ensuring Availability of Spectrum for Low-Power FM Stations," indicates a focus on ensuring that low-power radio stations receive access to spectrum.

²¹ Notice at ¶7.

²² 47 U.S.C. § 307(b).

With respect to Section 5(3) in the context of Section 5, Prometheus believes that a careful and precise reading of the statute’s words dictates a clear and unambiguous result, making any broader or narrower reading of the text inappropriate.²³ Specifically, this provision is a typical Congressional effort to freeze existing Commission rules and policy—in this case, the Commission’s existing treatment of translator stations and LPFM stations as both secondary to full-power radio stations.

To interpret this provision, the entire text must be read together. Looking at the provision itself in detail, the opening section of Section 5 requires the Commission “when *licensing* new FM translator stations,”²⁴ to ensure that “FM translator *stations*, FM booster *stations*, and low-power FM *stations remain equal* in status and *secondary* to existing and modified full-service FM stations.”²⁵ We review the key elements of the provision below.

As indicated in our comments, the terms “equal” and “secondary” do not refer to the cut-off rule, but instead refer to relative interference protections vis-à-vis full-power stations. The cut-off rule applies to applications, not stations, and gives a first-in-time preference to whichever *application* (an LPFM or translator) arrives first for a particular channel.²⁶ LPFM *stations* and translator *stations*, however, are equal in another manner, one that is explicitly referenced in the statute: both are secondary to full-power stations with respect to the interference protection rules of central concern to the Local Community Radio Act. Existing full-service stations are not required to protect proposed LPFM facilities, and operating LPFM stations are not protected

²³ *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

²⁴ LCRA, § 5, 124 Stat. 4072, 73 (2011) (emphasis added).

²⁵ *Id.* (emphasis added).

²⁶ Notice at ¶ 20; Third Report and Order, 22 FCC Rcd at 21929-30.

against interference from “subsequently authorized full-service facility modifications, upgrades, or new FM stations.”²⁷ Similarly, translators and LPFM stations both are secondary in the sense that they are licensed without regard to the extent of the interference they receive.²⁸

Critically important in understanding Section 5(3) is Congress’ use of the word “remain.” Congress has fixed in place current Commission practice with respect to these relative treatments—both ensuring that LPFM stations are not given primary status relative to full-power stations, as Prometheus has requested in the past,²⁹ and retaining the Commission’s existing policy, upheld by the courts,³⁰ permitting waivers of these rules, including those specified circumstances detailed in Section 3(b)(2).³¹ Congress has determined that LPFM stations and translators are technically similar and should be treated as such, particularly with respect to interference. This determination is illustrated in Section 7, which outlines in detail an interference standard premised upon extending to LPFMs the protection from interference offered translators.³²

While NAB and NPR generally concede the terms of the LCRA, both allege that the Commission’s proposed plan might be inappropriately favoring the low-power radio service over the translator service with respect to the Commission’s proposal to dismiss translator applications

²⁷ Third Report and Order, 22 FCC Rcd at 21936 (quoting First Report and Order, 15 FCC Rcd at 2231, ¶ 65).

²⁸ Second Further Notice, 22 FCC Rcd at 21944-45; 47 CFR § 73.807

²⁹ Third Report and Order, 22 FCC Rcd at 21936-7 (citing Prometheus Comments).

³⁰ *National Association of Broadcasters v. FCC*, 569 F.3d 416 (D.C. Cir. 2009).

³¹ *Id.* at 21937-42.

³² LCRA, § 7, 124 Stat. 4072, 74 (2011).

in some markets.³³ These generalized claims of the meaning of “equal in status” ignore the specific language of the statute referencing secondary status. Similarly incorrect are NPR’s arguments that the statute might somehow require the Commission to permit translators and LPFM stations an opportunity to resolve conflicts through settlements or modifications and that dismissing pending translator applications according to the Commission’s proposal violates the “equal in status” language.³⁴ The language of this provision cannot somehow apply in one moment to the processing order of applications, in another to the interference protections of stations, and in a third to the Commission’s relative “favoring” of one service or another in licensing policy. The language references stations, not applications or services, and the context of the LCRA’s focus on interference protections make the plain language reading of the statute clear.

Both NAB and NPR opposed granting LPFM stations primary status with respect to interference protection in relation to full-power stations. Congress agreed, and codified current Commission policy in this matter. It is not permissible to turn a specific and targeted Congressional provision governing an isolated interference issue into a wide-ranging provision

³³ NPR Comments at 2; NAB Comments at 6 (implying an assumption that LPFM services are “superior to FM translators in serving the needs of the community on an across-the-board basis” is contrary to “equal in status”).

³⁴ NPR Comments at 7; NAB Comments at 19-20.

that undermines the core goals of the LCRA. The incumbent broadcasters, having gotten their cake in Congress, cannot eat it too at the FCC.³⁵

While the FCC is not free to grant LPFMs or translators primary status, the FCC is free--and indeed required--to create licensing rules that allow for the expansion of the LPFM service in spectrum-limited communities.

IV. The Commission Should Directly Address Speculation In Translator Permits And Licenses.

The Commission should not defer action to address translator speculation, and other parties to this proceeding, in particular NPR, share our view on the appropriate tools to curb speculation. We wholeheartedly echo NPR's sentiment: "Curiously, the Third Further NPRM posits that 'absent translator license rule changes,' an application limit is 'the only effective tool to deter speculative activity,' but the instant rulemaking proceeding is an appropriate opportunity to adopt more effective tools³⁶.

In concrete terms, NPR shares our view that the Commission "can and should prohibit the sale of FM translator station construction permits on a for-profit basis and require future FM translator applicants to construct and operate a proposed station for a substantial period of time."³⁷ In addition, NPR shares our view that translator permittees should be able to recover only out-of-pocket expenses when selling a resulting translator construction permit. Support for

³⁵ Furthermore, it is completely unclear why, even if the term "equal" did apply as alleged by NPR, the Commission would be prohibited from assessing the relative number of stations already authorized in each service. NPR Comments at 8. It would seem axiomatic from a due process perspective that services in different stages of development with relatively different levels of access to available spectrum would be treated differently by the Commission when considering steps to ensure adequate access to spectrum.

³⁶ NPR Comments at 12.

³⁷ NPR Comments at ii.

restricting compensation for translator assignments is also expressed by EMF³⁸ and REC Networks.

Common Frequency proposes several new rules to realign the translator service with its intended purpose by collecting additional information from applicants and holding them accountable to providing a particular service. We strongly support such measures. Common Frequency's suggestions include requiring applicants to commit to rebroadcasting a specific source for at least two years, to demonstrate permission from the originating station to do so, and to provide an engineering attachment demonstrating that the full power station's signal coverage is deficient.³⁹ We also support Common Frequency's recommendation that translators may not charge more than reasonable operating expenses when leasing to third parties. If the Commission does not ban assigning translators for compensation outright, then we urge the Commission to consider Common Frequency's "two-then-four year" proposal, imposing a two-year prohibition on assigning a translator permit, followed by a four-year prohibition on assigning for compensation.⁴⁰

EMF argues that any cap on translator applications would be arbitrary and capricious.⁴¹ While we concur with EMF that the Commission has other, more direct tools with which to limit speculation, we do not believe that an application cap would be impermissible. Again, the task before the Commission per Congress is to ensure "licenses are available to FM translator

³⁸ EMF Comments at 13-14.

³⁹ Common Frequency Comments at 15. See also REC Networks Comments at ¶19.

⁴⁰ Common Frequency Comments at 15.

⁴¹ EMF p.4.

stations, FM booster stations, and low-power FM stations.”⁴² As 28 Representatives recently emphasized: “Implementation must ensure that sufficient channels are available in the most densely populated communities...while still processing applications for translators *where possible*.”⁴³ Similarly, if a cap on translator applications ensures the expansive launch that Congress intended for LPFM, then it is appropriate and in no way arbitrary.

We note that Common Frequency presents data supporting the Commission’s proposal of a market-specific cap. Common Frequency states, for example, that just two applicants hold 87% of the pending translator applications for the Fresno market, a total of 123 applications.⁴⁴ To address such scenarios, Common Frequency concurs with Prometheus that a cap of one application per applicant, per market would be appropriate.

As noted in our original comments, we share the serious concerns with HD rebroadcasting on FM translators raised by REC Networks, as does Common Frequency.⁴⁵ REC Networks asks “...do we need to clarify the definition of “fill-in” to apply to situations in FM radio where the primary station is not able to provide service in a portion of their protected contour due to terrain and in the case of AM, is not able to provide service due to interference?”⁴⁶ We believe that the Commission does need such clarification, and that translator stations permitted the additional flexibility allowed for fill-in coverage must demonstrate that they are in fact meeting this need and rebroadcasting the primary station’s main analog signal.

⁴² Third Further Notice of Proposed Rulemaking at ¶7, emphasis added.

⁴³ Sept. 7 Letter from Congress.

⁴⁴ Comments of Common Frequency at 10.

⁴⁵ Comments of Common Frequency at 15. REC Networks at ¶21-23.

⁴⁶ REC Networks at ¶22.

The rebroadcast of HD signals on FM translators enriches incumbent broadcasters at the expense of new voices, allowing licensees to originate new service without new public interest obligations and creating additional motivation for translator speculation.

We also support the proposal advanced by REC Networks in reply comments in consideration of the unique situation of KWMR⁴⁷. As noted in our original comments, translators can and should be expected to serve the public interest, but not all translators do so equally well. As REC Networks has noted, KWMR's proposed translator service appears to serve the intended purpose of a translator station, and the conditions raised by REC Networks would ensure that any translator application eligible for this exception would do so as well, while not harming LPFM availability in violation of the LCRA.

V. Relaxation of AM Rebroadcast over FM Translators is Premature.

We do not support expansion of AM use of FM translators at this time, and several parties share our concerns. NPR concurs with our view that the FCC should not relax the limit on cross-ownership because the increased demand will increase trafficking. NPR opines, as does Prometheus, that AM over FM rebroadcast should not be permitted “unless and until this matter [trafficking] is satisfactorily resolved.” Common Frequency also asks the Commission to tie relaxed cross-ownership to public interest aims, including localism and diversity criteria.⁴⁸ We share the concern of REC Networks that translators rebroadcasting AM service are considered “fill-in” service, allowing increased power levels that foreclose future opportunities for LPFM

⁴⁷ See KWMR Comments and REC Networks Reply Comments at ¶12-14.

⁴⁸ REC Networks at ¶16.

stations.⁴⁹ We concur that until the fill-in coverage rule is better defined, AM over FM rebroadcast should not be expanded.

Conclusion

We commend the Commission for its direction in the *Third Further Notice*, and we urge the Commission to consider the widespread public support for the expansion of LPFM demonstrated in this proceeding. The Commission must ensure LPFM availability in urban areas in compliance with the Local Community Radio Act, as it is these areas of significant population which have been historically deprived of LPFM service and are therefore addressed by the legislation. We urge the Commission to adopt the LPFM availability assessment proposal of Prometheus, REC Networks, and Common Frequency, exercise caution to preserve LPFM opportunities, and directly address translator speculation.

Respectfully submitted,

/s/

Brandy Doyle
Policy Director
Prometheus Radio Project
P.O. Box 42158
Philadelphia, PA
(215)727-9620 x518

Cheryl A. Leanza
Consultant
A Learned Hand, LLC
www.alearnedhand.com

Andrew Jay Schwartzman
Chrystiane Pereira
Media Access Project
1625 K Street, NW
Suite 1000
Washington, DC 20006
(202) 232-4300
Counsel for Prometheus Radio Project

⁴⁹ REC Networks Comments at ¶27.